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EPA TO CLARIFY WHEN STATES CAN DOWNGRADE WATERS' DESIGNATED USE

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EPA officials are seeking to help states clarify long-standing questions over when they can downgrade waterbodies' designated uses, which is a step regulators must take to weaken water quality standards when waters are not meeting existing standards.

The agency's efforts could help industry sectors struggling to meet current water quality requirements, such as wastewater treatment facilities with combined sewers and oil and gas production operations whose discharges create so-called effluent-dependent streams.

Combined sewer overflows (CSOs) occur when sewer systems designed to handle both sewage and stormwater overflow during heavy rain, causing some untreated sewage to spill into waterways. Effluent-dependent streams are streams created by discharges from industrial processes including oil drilling sites and wastewater treatment plants that can sustain aquatic life or provide other uses.

Under EPA's current rules, regulators set designated uses -- such as recreation, drinking water supply, industrial use and others -- for waterbodies and then impose corresponding water quality standards to protect those designated uses. If states are unable to ensure waterbodies meet the standards, they can petition EPA to downgrade waterbodies' designated uses.

But EPA has never approved a state's request for a change in waters' designated uses affected by either effluent-dependent streams or CSOs, state sources say.

To justify a change in designated use, states must conduct a use attainability analysis (UAA) that would inform the state of the most appropriate use category for that waterbody. While the Clean Water Act expressly allows downgrading water quality standards in situations where waterbodies cannot attain their designated uses, proving that a downgrade is needed has proven difficult for states.

EPA officials are now working with western states on a "question and answer" document aimed at answering state questions regarding how to define waterbodies' "existing uses" and under which conditions uses could be changed for effluent-dependent streams.

The document appears likely to be based, in part, on recent EPA responses to state questions a top agency water official, Denise Keehner, issued Oct. 21. *Relevant documents are available on InsideEPA.com.*

In a separate effort, EPA headquarters officials are working on guidance aimed at helping CSO communities conduct UAAs.

EPA is also hosting six pilot projects in CSO communities around the country to determine how various site-specific CSO concerns could warrant designated use changes. An EPA source says

the agency will "produce a document" containing the findings of the CSO pilot studies, but was unsure what form the document would take or which particular issues it would address.

State and industry sources say the ability to downgrade designated uses is particularly important in CSO-affected waters and effluent-dependent streams because these waters often cannot attain water quality standards even after industry spends billions of dollars on infrastructure upgrades.

In the case of CSO-affected waters, states are questioning whether waterbodies' existing use should be protected at times where people are swimming in waters where CSOs have occurred due to heavy rains, for example. "What we're asking is if we have to protect waterbodies for the swimming use in stormy conditions when people shouldn't be swimming in the first place," one wastewater treatment industry source says.

In the case of effluent-dependent streams, states have questioned whether it is always necessary to conduct a UAA before changing a designated use, and whether there is an obligation under federal law to continue discharges into effluent-dependent streams under conditions where existing use is dependent upon that flow.

For example, EPA Region VIII staff in June recommended that the agency reject Wyoming's request to remove the aquatic life designation from Whitetail Creek, a small, effluent-dependent waterbody fed by discharges of produced water from an oil treating facility. But proponents of downgrading the streams' designated use say continuing to require industry to meet water quality standards could lead facilities to curtail the discharges and effectively eliminate the streams regulators are trying to protect.

Meanwhile, the CSO Partnership -- a group of wastewater treatment industry officials who work to influence CSO policy -- is calling on EPA to solve the designated use issue through guidance.

The group has submitted a proposal to EPA that lists four options the agency could implement to clarify how UAAs should be applied in changing designated uses. The group's preferred option involves subcategorizing designated uses, such that a subcategory such as "swimming during the swimming season," or "swimming during wet weather" would not constitute use changes from the blanket "swimming" designation and would not require a UAA.

A source familiar with the proposal says the CSO Partnership expects EPA to release a guidance based on the recommendations after the November election.

However, a top EPA water official was unfamiliar with the proposal and says the agency was making "no commitments" to release such a guidance in the near future. "We're looking at if guidance is appropriate," the official says. "We're starting discussions with states to see what form it should take." -- *Natalie Baughman*